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Filed Feb. 13, 1899.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

J. M. TURNER AND J. M. WELBURN, PLAINTIFFS IN ERROR,

VERSUS

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND C. C. WRIGHT, DEFENDANTS.

In Error to the Supreme Court of the State of North Carolina.

Argument of A. C. AVERY, Attorney for Defendants.

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The action was originally brought in the Superior Court of Wilkes County, North Carolina, by the defendants, the Board of Commissioners of Wilkes County, and C. C. Wright, a taxpayer of said county, against Clarence Call, Treasurer of said county. The relief prayed for was that the said Call should be enjoined and restrained from paying the interest on certain bonds, issued by said county in payment of a subscription to the capital stock of The Northwestern North Carolina Railroad Company, and that the said bonds should be declared invalid, for want of authority in the Board of Commissioners to make the subscription or create the bonded debt.

The plaintiffs in said action, the defendants here, allege and attempted to show, that the bonds were issued without lawful authority, because the statutes purporting to authorize the creation of the bonded debt, were not enacted in accordance with the requirements of the Constitution of the State of North Carolina.

STATUTES RELIED ON AS AUTHORITY FOR CREATING THE BONDED DEBT.

The plaintiffs in error relied, in order to show authority in the constituted authorities of Wilkes County to issue the bonds, on the following statutory provision:

1. The amendment to the charter, recited in the face of the bonds as authority for issuing it (sec. 4, chap. 43, Laws of 1879), which it was admitted failed to pass both Houses of the Legislature as required by section 14, article 2 of the Constitution, which is hereinafter fully set out; and chapter 156, section 4 of the Laws of North Carolina of 1881, which will be hereafter fully set forth, and which, as was also proven and admitted, was not enacted in accordance with the requirements of section 14, article 2.

2. Sections 1996 to 2000 of The Code of North Carolina, which were originally enacted in 1868, and which sections were admitted to have been reenacted as a part of The Code in 1883 in the manner prescribed by the Constitution.

3. Upon the ordinance of the Constitutional Convention of 1868, chapter 17, page 57, sections 2 and 12, which was enacted before the ratification of the Constitution of 1868, on the 24th of April, 1868; and Justice Furches, in his dissenting opinion, relied on an amendment thereto, ratified on the 11th of August, 1868, which is published as sections 1, 2 and 3 of chapter ..., of the Private Laws of the Special Session of 1868, which last-named amendment it is admitted by counsel in an agreement hereinafter set forth, did not pass in accordance with the requirements of said section of the Constitution, which had been previously ratified on said 24th day of April, 1868. For the reason that it had not passed as required and therefore, if in evidence, raised the same question involved in the consideration of the amendment of 1879 and 1881, counsel had agreed the Act of August 11 should not be considered. See agreement of counsel in printed record.

All of the statutory provisions relied upon to empower the Commissioners of Wilkes County to pay its bonded debt, will be set forth in full in the discussion of the assignments of error, which refer to each particular act.

The county of Wilkes issued, on October 1, 1889, one hundred bonds of the denomination of $1,000 each, each bond reciting upon its face as authority for issuing it section 4, of chapter 43, Laws of North Carolina, of 1879. See opinion of Douglas, J., 31 S. E. Rep. (No. 10), page 481.

The material portion of section 4 is as follows:

"Sec. 4. That any township or city, town, county, or other municipal corporation of this State, shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county, or other municipal corporation may elect to take therein."

It was proven and admitted that the statute (chap. 43, Laws of 1879) was not passed by both Houses of the General Assembly in accordance with the requirements of section 14, article 2, of the Constitution of North Carolina, which is as follows:

Article 2, section 14: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal."

Another pertinent provision of the Constitution is article 7, section 7, which is as follows:

"No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

It is not denied that two elections were held in the years 1887 and 1888, (see printed record, pp. . . .), and that it was ascertained and declared by the proper officers that a majority of

the qualified voters of Wilkes County had voted in favor of the subscription, and that the bonds were subsequently issued on October 1, 1889.

ARGUMENT.

SECOND ASSIGNMENT OF ERROR.

It seems that the question involved in this controversy can be more clearly presented by first considering the second assignment of error in connection with the fourth. The second assignment is:

"That the Court erred in holding that the subscription of $100,000 to the capital stock of The Northwestern North Carolina Railroad Company by the Board of Commissioners of Wilkes County was not authorized by the amendments to the charter of the said Northwestern North Carolina Railroad Company, enacted after the year 1868. And the said J. M. Turner and J. M. Welburn, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section, by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board."

The pertinent portions of article 2 of the Constitution are:

"Sec. 14. No law shall be passed * * * to impose any tax upon the people of the State or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have * * passed three several readings, on three different days and unless the ayes and nays on the second and third reading of the bill shall have been entered on the Journal."

"Sec. 16. Each House shall keep a Journal of its proceedings; it shall be printed and made public immediately after the adjournment of the General Assembly."

The Constitution of Illinois contained similar, in fact almost identical, provisions, as follows:

"Sec. 3. Each House shall keep a Journal of its proceedings and publish them," etc.

"Sec. 21. * * * on the final passage of all bills, the vote shall be by ayes and noes, and shall be entered upon the Journals, and no bill shall become a law without the concurrence of a majority of all the members-elect in each House."

It is difficult to distinguish the meaning of the words "no bill shall become a law" and the language used in the other case "no law shall be passed." So the only material difference between the provisions of the two Constitutions is that the North Carolina law is more stringent in requiring the passage of the law with the same formalities on both the second and third readings in each House.

South Ottawa v. Perkins, and
Supervisors v. Post, 94 U. S., 260.

"It is declared by the Judiciary Act as a fundamental principle 'That the laws of the several States, except where the Constitution, treaties or statutes, of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply.'

1 Stat. at L., 73, sec. 34.

"And this court has always held that the laws of the States are to receive their authoritative construction from the State courts, except where the Federal Constitution and laws are concerned; and the State Constitutions, in like manner, are to be construed as the State courts construe them. This has so often been laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities."

"If, therefore, the law in question *had never been passed upon* by the *State courts*, the courts of the United States would, *nevertheless, be bound* to give to the *Constitution of Illinois the same construction which the State courts give to it*, and to hold a *pretended* act of the Legislature *void* and not *a law which the State courts would hold to be so.* Otherwise, we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same State, differing as to the validity and existence of a statute of that State, without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. As

a matter of propriety and right, the decision of the State courts on the question as to what are the laws of the State is binding upon those of the United States."

South Ottawa v. Perkins, supra.

"If, for instance, the Supreme Court of a State should hold that an act appearing on her statute books was *never passed and never became a law, the Federal Court could not disregard the decision and declare that it was a law and enforce it as such.*"

Norton v. Shelby County, 118 U. S., 425.

To sustain the foregoing proposition, Justice Fields cites South Ottawa v. Perkins, and Post v. Supervisors, supra.

"Upon this point there seems to be a settled course of decisions in the highest court of Kentucky; and upon such a subject as the organization or composition of a tribunal established by the fundamental law of the State, those decisions are at least entitled to great weight."

Merriweather v. Muhlenburg County Court, 120 U. S., 354.

The case of Rich v. Mentz, 134 U. S., 632, depended upon the question whether the requirement of a statute that a petition should state that the petitioners were a majority of the taxpayers of a town was mandatory, and a compliance with it was condition precedent to the acquisition by a town of authority to issue the bonds in aid of a railroad company, or whether, in the absence of such statement in petition, it was sufficient that the county Judge to adjudicate that a petition wanting in these prerequisites was sufficient. The Chief Justice, speaking for the court, said: "These views are in accordance with the repeated adjudications of the Court of Appeal of the State of New York, construing this statute; and upon question of this character, when arising as here, the decisions of the highest judicial tribunal of the State are entitled to great and *ordinarily decisive* weight."

The case of Merriweather v. Muhlenburg, supra, was cited

in Bullet County v. Washer, 130 U. S., 142, and the ruling of the Supreme Court of Kentucky was again followed.

It is conceded by Judge Simonton in his opinion in Coler v. Commissioners of Stanly County, et al., 89 Fed R., 257, that section 14, article 2, of the Constitution of North Carolina is so plainly mandatory in its requirements as to make it obligatory upon the Federal Court to pronounce any statute not passed in pursuance of its requirements unconstitutional and void.

In this case it may be said, as was said by Chief Justice Fuller in Rich v. Mentz, supra, that the rule has been definitely settled by repeated adjudications of the Supreme Court of North Carolina.

The cases are the following:

Bank v. Commissioners, 119 N. C., 214.
Commissioners v. Snuggs, 121 N. C., 394.
City of Charlotte v. Shepperd, 120 N. C., 411.
Id., 122 N. C., 602.
Rodman v. Town of Washington, 122 N. C., 39.
Board of Commissioners v. Call, 31 S. E. R., 481.
Commissioners of Buncombe v. Payne, not yet reported, 31 S. E. R. * * *

If, in accordance with the general rule, the adjudication of the State Court construing its own Constitution is to be followed by the Federal tribunal, then the two Acts of 1881, and of 1879, which are recited as authority for the issue of the bonds, are unconstitutional and confer no right upon the plaintiffs in error as bondholders.

Norton v. Shelby County, 118 U. S., 425.

THE CONTENTION OF PLAINTIFFS IN ERROR.

Has this case been brought within the exception laid down in Burgess v. Seligmon, supra? It is contended that there were prior adjudications inconsistent with the decision in Bank v. Commissioners, which had become rules of property, and which adjudications were overruled in that case. The decisions fail to support such contentions.

If section 14, article 2, of the Constitution of North Carolina had never been construed by an adjudication of the Supreme Court of the State prior to that in Bank v. Commissioners, 119 N. C., 214, and, if for that reason, it should be conceded that the duty of interpreting its meaning now devolves upon the Supreme Court of the United States, the defendants in error would have no ground to apprehend that a construction different from that adopted by the State tribunal would be placed upon language so plainly prohibitory and mandatory as that used in said section. *The authority to construe will not be held to involve the right to judicially amend the Constitution.*

23 Am. and En. Enc., 453.
Cooley's Cons. Lim. (6th Ed., '89).

It has been contended, however, that the opinion in Bank v. Commissioners, 119 N. C., 214, in effect overruled the opinion in the same case, when it was previously before the court, as reported in 116 N. C., 339, on the one hand, and that on the other hand it overruled the older adjudications in Carr v. Coke, 116 N. C., 243; Broadnax v. Groom, 64 N. C., 244; and Scarborough v. Robinson, 81 N. C., 236. When the case of Bank v. Commissioners, 116 N. C., 339, was tried in the lower court, no evidence was offered to show that the provision of the charter purporting to authorize the subscription had not been enacted in accordance with the Constitutional requirements, and the court only passed upon the sufficiency of the authority conferred by the terms of the statute, which in the absence of proof was presumably valid, and, upon the validity of a contract under a statutory provision, to compromise a debt for less than its face value. See 116 N. C., at page 220. The same question arose in Amoskeag National Bank v. Ottawa, supra, where the Court said:

"Nor is it of any importance that the Acts of 1857 had been assumed to be an existing law in Dunovan v. Green, 57 Ill., 53, and Force v. Battavia, 51 Ill., 99; for in each of those cases *the validity of the statute was not controverted*, and by the established practice of that court no evidence of the contents of the Journals could be considered on appeal which had not been produced and made part of the case in the court below."

JUDGE PURNELL MISCONCEIVES FACTS AND ERRS IN CONCLUSIONS OF LAW.

So in Bank v. Commissioners, supra, the validity of the act authorizing the subscription was not controverted on the first trial and no evidence of the contents of the Journals was offered. Judge Purnell, of the Eastern District of North Carolina, in a recent opinion filed in the Circuit Court at Raleigh, seems to have misconceived the facts, and therefore to have misstated the law applicable. His opinion, in effect, overruled that of the Supreme Court of North Carolina, and rests upon the erroneous supposition that the second ruling in Bank v. Commissioners, supra, was inconsistent with that first enunciated.

In Bank v. Commissioners, 119 N. C., at page 222, Justice Clark very clearly distinguishes that case from Carr v. Coke, supra, as follows:

"This case bears no analogy to Carr v. Coke, 116 N. C., 223, which merely holds that when an act is certified to by the Speakers as having been ratified, it is conclusive of the fact that it was read three several times in each House and ratified. Constitution, article 2, section 23. And so it is here; the certificate of the Speakers is conclusive that this act passed three several readings in each House and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each House, and that the yeas and nays were entered on the Journals. The Journals were in evidence and showed affirmatively the contrary.

"The people had the power to protect themselves by requiring in the organic law something further, as to acts authorizing the creation of bonded indebtedness by the State and its counties, cities and towns, than the fact certified to by the Speakers of three readings in each House, and ratification. This organic provision plainly requires, for the validity of this class of legislation, *in addition* to the certificates of the Speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the Journals on the second and third readings in each House. It is provided that such laws are 'no laws,' i. e., are void unless the bill for the purpose shall have been

read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days, and approved by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal. This is a clear declaration of the nullity of such legislation unless this is done, and every holder of a State or municipal bond is conclusively fixed with notice of this requirement as an essential to the validity of the bond."

In Scarborough v. Robinson, 81 N. C., 409, the only question involved was, whether under proper construction of section 23, article 2, of the Constitution, which requires that all bills and resolutions of a legislative nature shall be read three times in each House and shall be signed by the presiding officers of both Houses, a bill which was passed in each House but was not signed by such officers could be enforced as the law, and whether the defect could be cured by mandamus requiring said officers to sign after the expiration of the legislative session. The Court held the bill without such signatures incurably defective.

In Broadnax v. Groom, 64 N. C., at page 247, Chief Justice Pearson said, *obiter*, "We do not think it necessary to enter into the question, whether this is a *public local act*, or mere *private act*, in regard to which thirty days' notice of the application must be given." With this introduction he proceeded to discuss the question whether the courts would go behind signatures of the presiding officers, if a proper case were presented for adjudicating the question. Section 12, article 2, of the Constitution, provides that:

"The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such law shall have been given, under such direction and in such manner as shall be provided by law." While the learned Chief Justice compared an act so signed to a record he said, in this *obiter* expression of his views, that courts must act on the maxims "omnia presumuntur." As, under this provision of the Constitution, the Legislature was required to provide the manner of giving such notice, and had provided

by statute that notice should be given by publication in a newspaper for the prescribed time, and as no means were provided in the Constitution or statute for making such notices matters of record, it is clear that the comity, due to a co-ordinate branch of the Government from the courts, required them to act upon the presumption that the Legislature had before it satisfactory information that the proper notice had been given. An analogous case is found in the interpretation of section 1, article 8, of the Constitution, which provides that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, *and in cases where in the judgment of the Legislature, the object of the corporation can not be attained under general law.*" The volumes of special acts passed by the General Assembly are held not repugnant to this section, because it is presumed to be the judgment of the Legislature in every instance that the object can not be attained under general law.

The distinction between the enactment of a private law and the passage of an act coming within the purview of section 14, article 2, will clearly appear, therefore, upon an examination of section 16, article 2, of the Constitution, already cited, and which provides that "each House shall keep a Journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly." In Amoskeag National Bank v. Ottawa, supra, it was held that "the printed Journals of each House of the Legislature published in obedience to law are competent evidence of its proceedings." Where such a mandate of the law is obeyed there is no longer room for presumption, while on the other hand where no record is required or made, comity requires that the court should assume that the Legislature acted in accordance with law. The Court said in Amoskeag National Bank v. Ottawa, supra:

"The copies of the Journals, certified to by the Secretary of State, and the printed Journals published in obedience to law, are both competent evidence of the proceedings in the Legislature."

So that the presumption arises upon the signature of the two presiding officers that everything antecedent to the signing

was done in accordance with the requirements of the law, but that presumption may be rebutted by *exhibiting the Journals, which the law has carefully provided for preserving as evidence. But there being no evidence or means provided for preserving the evidence as to notice of an application for the enactment of a private law*, the presumption that first arises must, ex necessitate, remain for want of means or evidence to rebut it.

THIS ACTION NOT BROUGHT TO REPUDIATE A MORAL OR LEGAL OBLIGATION, BUT TO ASSERT THE INDIVIDUAL RIGHTS OF TAXPAYERS.

Since Mr. Webster presented with so much diffidence and distrust, as Mr. Lodge tells us, the proposition that the inhibition of the Constitution (art. 1, sec. 10) was intended, as well to prevent a State from repudiating its own contracts, as from giving its sanction to the impairment of contracts between persons, the evolution of the principle enunciated in the Dartmouth College Case has been so extensive, as to fill with wonder those who are accustomed still to recur to the Constitution, as understood and interpreted by its framers, as a chart for the guidance of the courts in fixing just limits to the delegated powers of the Government.

In the laudable desire to foster commerce, by inspiring confidence in all securities thrown upon the markets of the country, courts are prone to forget or overlook the rights of the individual taxpayers, who are often heavily burdened to pay bonds issued by the municipalities in which they have property. As the taxpayer reviews the history, (which seldom reaches the higher courts), of the irregularities often attendant upon the creation of such debts, it is no ground for surprise if his faith is sometimes shaken in the trite boast of our jurists that the English and American systems of jurisprudence were founded upon the bedrock principle that the governments are created primarily for the protection of the weak against the strong, and of the poor against the power of wealth. The people still believe, that high above the turbid atmosphere, where the power of aggregated wealth fits burdens to the backs of the poor, there is a tribunal that will forever protect the pennies

of the poor as well as the pounds of the rich. Before such a court they dare present their grievances without fear that individual right will be ignored because their petitions may be drowned in denunciations of cultured counsel. Confident that the clear presentation of a legal right can not be obscured by the cry of repudiation or communism, so often used to cover up oppression, the defendants may be pardoned for calling attention to the irregularities, which they contend have been already cured in this, as in hundreds of other cases, where counties have created debts. A change of names will fit the leading facts to each particular case. A railroad company acquires an influence over the Board of County Commissioners, who agree to submit the question of subscription. In order to obviate the requirement that the proposition must receive the sanction of a majority of the registered or qualified voters, arrangements are made, through the Board, to have a large number of names stricken from the registration books and the result of the election ascertained and declared upon an examination of sch lists of voters. While some of the taxpayers are subsequently concerting measures to prevent the issuing of bonds, the Board, after the final declaration of the result of the election, combines with the railroad corporation to place the bonds upon the market. The taxpayers being without organization, and poorly provided with money, their agents being controlled by their oppressors, are told that all irregularities are cured, or still worse, that foreign bondholders have brought suit in the Federal Circuit Courts and the Commissioners have suffered the county and the taxpayers to be forever precluded by a judgment declaring the bonds valid.

Where the taxpayers, as in this case years ago, submitted to a nonsuit, in the fear of a repetition of the history of similar controversies in other counties, they were startled to learn a few years ago that any legislator had ever been so careless, incompetent, or corrupt as to allow to be disregarded the plain mandate of the Constitution that "no law shall be passed to raise money on the credit of the State or to *pledge the faith of the State directly or indirectly, or to allow the cities, counties or towns to do so*, unless the bill for the purpose shall have been read three several times in each House," etc.

It was a revelation to the people of the State, when investigation following upon the heels of the rendition of the opinion in Bank v. Commissioners, 119 N. C., 214, disclosed the fact that the bonded indebtedness of a half dozen counties had been created contrary to law. After such frauds have been for years concealed under the specious cover of irregularities, a new Board of Commissioners of Wilkes County, who happen to be free from corporate control, and to have heard the just complaints of the taxpayer, determined to appeal to the courts. Their just demands are met, at the threshhold, with the objection that the language of the Constitution, which is too plain to mislead the most *ignorant and illiterate, had not been* interpreted before the contract was entered into by issuing the bonds in 1889. The perfect law is one so plain and unmistakable in its terms as to need no construction by the courts. If the meaning of every prohibitory provision of our law were as obvious as that of the section in question, no citizen of North Carolina could justly complain that the law did not excuse ignorance of its requirements. *Shall it be solemnly declared by the courts, as the new doctrine, enunciated in Burgess* vs. *Seligman, that well-established rules must be disregarded to the detriment of the citizens of a State, because its lawgivers possessed the rare faculty of crystallizing a Constitutional prohibition in plain terms—in language so unmistakable that no one for twenty-five years ever questioned its obvious meaning?*

THIRD ASSIGNMENT OF ERROR.

"3. That the Court erred in holding that the subscription of $100,000 to the capital stock of the Northwestern North Carolina Railroad Company by the Board of Commissioners of Wilkes County, was not authorized by the provisions of The Code of North Carolina, sections 1996 to 2000, inclusive. And the said J. M. Welburn and J. M. Turner, plaintiffs in error, say that the said ruling was in violation of section 10, article 1 of the Constitution of the United States and deprives them of the protection of said section by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board."

Section 1996 of The Code provides, the "Boards of Commis-

sioners of the several counties shall have power to subscribe stock to any railroad company or companies, when necessary, to aid in the completion of any railroad, in which the citizens of the county may have an interest."

Section 1999 provides that, "In case the county shall subscribe the amount proposed in bonds the Board of Commissioners shall have power * * * to raise by taxation from year to year the amount necessary to meet the interest on said bonds."

The Act of 1885 (chap. 174, sec. 23 of the Laws of 1885) provides, that "If the tax levied by the State for the support of the schools shoud be insufficient * * * then the Board of Commissioners of each county shall levy annually to supply the deficiency," etc.

The appellants contended:

1. That long before the date when the bonds in controversy were issued (on October 1, 1889), the Supreme Court of North Carolina had so construed article 5, sections 1, 6 and 7, of the Constitution of North Carolina, as to render the said sections of The Code invalid and insufficient, as authority to the Board of Commissioners of Wilkes County to create said debt and levy tax essential to its creation, and established a rule of property for the protection of the taxpayers of said county, of which the purchasers of the bonds in controversy had constructive notice, before purchasing, and that the Federal courts are bound to follow the said construction, placed by the highest appellate court of North Carolina upon its own Constitution and statutes, and to pronounce the said sections of The Code insufficient to clothe the said Commissioners with power to create the said debt.

2. That long before the time when said bonds were issued the Supreme Court of North Carolina had construed language used in article 5, section 4, of the Constitution of the State, synonymous in meaning and almost identical in terms with that employed in section 1996 of The Code, and that under such interpretation the Board of Commissioners of the county of Wilkes were not authorized by the said section to create a debt in aid of an unfinished road, such as the Northwestern

North Carolina Railroad was admitted to have been, when said subscription was made, or in aid of any railroad, in which the said county of Wilkes at the time had no pecuniary interest, and that the Federal courts were bound to follow such interpretation of the statutes made before the said bonds were issued, and the purchasers of said bonds were deemed to have had notice of such rulings.

3. That if the said sections of The Code were not invalid under any ruling of the highest court of the State, made before the bonds in controversy were issued, the construction placed by the Supreme Court of North Carolina upon said sections was reasonable, and, if the question whether said ruling was correct was "balanced with doubt" it was the duty of the Federal Court, in obedience to the ruling of the Supreme Court of the United States, to resolve such doubt in favor of the adjudication by the State tribunal.

CONTENTION OF DEFENDANTS.

The defendants contended that the said sections of The Code had never been construed and pronounced insufficient to authorize the creation of a bonded debt by a county prior to the date when the bonds were issued, and that therefore the Federal courts were at liberty to construe said section according to the interpretation of its true meaning.

I.

Was section 1999 of The Code invalid and insufficient under article 5 of the Constitution to authorize the creation of the debt?

The pertinent sections of article 5 above mentioned are as follows:

"Section 1. The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash * * * The State and county capitation tax combined shall never exceed two dollars on the head."

"Sec. 6. The taxes levied by the Commissioners of the several counties shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax *except for a special purpose and with the special approval of the General Assembly.*"

"Sec. 7. Every act of the General Assembly *levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other.*"

At the October Term, 1885, of the Supreme Court of North Carolina, and nearly five years before the bonds were issued, on October 1, 1889, the Supreme Court of North Carolina construed section 23, chapter 174 of the Laws of 1885, and declared that it was insufficient to authorize the Board of Commissioners of Sampson County to levy a special tax, in order to raise a fund sufficient to maintain the public schools in said county for four months in the year. Although it was provided in the State Constitution that "one or more public schools shall be maintained at least four months in every year, and, if the Commissioners of any county shall fail to comply with the aforesaid requirement of this section, they shall be liable to indictment" (art. 9, sect. 3), the Court held, that a levy under the Act of 1885 for such purpose was unauthorized. The said statute was as follows:

"Sec. 23. Section 2590 of The Code is amended to read as follows: If the tax levied by the State for the support of the public schools shall be insufficient to maintain one or more schools in each school district for the period of four months, then the Board of Commissioners of each county *shall levy annually a special tax to supply the deficiency for the support and maintenance of said schools for the said period of four months or more.* The said tax shall be collected by the sheriff in money, and he shall be subject to the same liabilities for the collection and accounting of said tax as for other taxes. The said tax shall be levied on all property, credits and polls of the county; and in the assessment of the amount on each the Commissioners shall observe the Constitutional equation of taxation; and the fund thus raised shall be expended in the county in which

it is collected in such manner as the County Board of Education may determine, for maintaining the public schools for four months at least in each year," etc.

Comparing the provisions of The Code, we find that after providing in section 1996 that "The Boards of Commissioners of the *several counties* shall have power to subscribe stock to any railroad company," etc., and specifying in sections 1997 and 1998 how elections may be held in any county and how subscriptions may be made, the pertinent section 1999 is as follows:

"In case the county shall subscribe the amount proposed in bonds, the Board of Commissioners shall have power to fix the rate of interest, not to exceed the rate of 8 per cent, when the interest on said bonds shall be payable and at what place, and to also fix the time and place of paying the interest, and shall also determine the mode and manner of the same; *and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.*"

In Barksdale v. Commissioners, 93 N. C., 472, 475, Chief Justice Smith, for the court, said in the year 1885, four years before the bonds were issued on October 1, 1889:

"The levy finds no support in section 6, article 5, for this is not one for 'a *special purpose* and with the *special* approval of the General Assembly' for *county purposes.* The enactment is in general *applicable to the whole State*, and part of the general State legislation in furnishing facilities for the education of its people. *It can not find shelter* under any of the numerous adjudications sustaining the power to tax beyond the assigned restraints, and in disregard of the established ratio between State and county taxation, which will be found at the foot of the section":

"This form of taxation is *local as well as special*, and *such has been the legislative interpretation of this clause in the frequent cases in which a special approval has been asked and obtained.*

Broadnax v. Groom, 64 N. C., 244.
Simmons v. Wilson, 66 N. C., 336.

Mauney v. Commissioners, 71 N. C., 486.
Trull v. Commissioners, 72 N. C., 288.
French v. Commissioners, 74 N. C., 692.
Cromartie v. Commissioners, 87 N. C., 134."

"These cases settle the extent of the taxing power when exercised by the county authorities, and allow its restraints only to be disregarded, when the tax is needed to meet obligations existing before the Constitution by virtue of the Constitution of the United States, etc. * * * But as the repugnance of the provisions under consideration is manifest, the Commissioners must refrain from assessments, however necessary for schools, which pass the bounds of conferred power." The language which the Court said would be found at the foot of the section is: "except for a *special purpose* and *with the special approval* of the General Assembly."

The authority to levy a tax was conferred in the Act of 1885 upon the "Board of Commissioners of each county," and this was held unconstitutional, not because *it appeared, whether the tax would exceed the limit, but* because it *was not special* in *pointing out the specific county*, nor *local* in *confining the authority to a specified municipal* corporation or county, so that the representatives of the community affected would have notice. Did not every purchaser of a bond issued in 1890 have notice of this decision as a part of the laws of the State? It recited the sections of The Code, where the authority purported to be given to "the Commissioners of the several counties" to subscribe and to the "Board of Commissioners of any county" to order an election, followed by section 1999, purporting to vest the power to levy a tax for schools (not for the ordinary expense of the counties)—a tax which the Legislature could not delegate the authority to levy, without a valid provision in the statute granting the right to levy.

Cons. Lim., art. 5, sec. 7.

In Board of Edcation v. Commissioners, 111 N. C., 579, the Court again construed section 23, Laws of 1885, and adhered to the older ruling. The Court said at page 580: "It appears from an examination of the authorities that no case has ever come

before the courts involving the exercise of this *special power* of taxation by the counties, except *upon special* or *private acts* for local objects, *until the Act of 1885 was brought* to our attention." It thus appears that the court has constantly and persistently construed section 6, article 5, of the Constitution in the same way.

In the same opinion (111 N. C., at p. 580) the Court said: "It is well settled, that for the *ordinary expense* of the government, both State and county, the first section of article 5 of the Constitution places the limit of taxation and preserves the equation between capitation and property."

In Board of Education v. Commissioners, 107 N. C., 110, 113, Chief Justice Merrimon, for the court, said: "And, moreover, the several counties can levy taxes to meet the *ordinary expenses of the county government* within the limitation of taxation mentioned." The utmost latitude allowed by the court in the enactment of these laws providing for the levy of taxes above the Constitutional limit or for other purposes than the ordinary expenses of the counties, is, that the Legislature is not bound under the ruling in Broadnax v. Groom, 64 N. C., at page 248 (which has been discussed in another connection) "*to set out the precise sum*" to be raised by the levy.

In Vaughan v. Commissioners, 117 N. C., at page 434, the Court said: "It is within the province of the courts to determine what are necessary public buildings and what classes of expenditures fall within the definition of necessary expenses of a municipal corporation." Satterwaite v. Commissioners, 76 N. C., 154. The terms "ordinary" and necessary expenses are thus used to mean the same thing.

In the case of Commissioners of Buncombe County v. Payne, decided at the last term and not yet reported, the Court said (after referring to art. 5, sec. 6, of the Constitution): "A general act authorizing any and all counties to issue bonds for railroad purposes would be invalid, especially when (as is the case here) it is necessary to exceed the Constitutional limitation to pay interest or principal."

Tate v. Commissioners, 122 N. C., 812 (at p. 815).
Herring v. Dixon, Id., 420 (at p. 424).

Barksdale's case did not depend upon the question whether the limit would be exceeded in any given case It was held sufficient, as in our case, that it might become necessary to exceed it.

In Tate v. Commissioners, the Court said (referring to older adjudications cited in Herring v. Dixon, supra): "For other purposes, than necessary expenses, a tax can not be levied either within or in excess of the Constitutional limitation except by a vote of the people under special legislative authority."

It is provided in article 7, section 7, of the Constitution, that "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied, or collected by any officer of the same, except to meet the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein."

These adjudications had established as the settled construction of the Constitution of North Carolina by its highest court before July 1, 1890:

1. That no debt could be created by a county, except for its "necessary" or, what was *declared* to *be synonymous*, its "*ordinary*" expenses.

2. That a subscription to the capital stock of a railway company, like a levy for schools, is not an ordinary or necessary county expenditure.

3. That a tax levied to meet a bonded debt, created by such subscription, is a special tax, the levy of which is imperatively required by section 7, article 5, to be provided for in the act authorizing the creation of the debt, and which, under the mandate of article 5, section 6, supra, can not be imposed without express authority specifically conferred on a particular county or other local agency of the State.

THE GENERAL RULE AS TO JURISDICTION.

"It must be regarded as a settled question, that whether statutes of a Legislature of a State have been duly enacted, in accordance with the requirements of the Constitution of each State, is not a Federal question and the decision of the State courts, as to what are the laws of the State, are binding upon the courts of the United States."

Leiper v. Texas, 139 U. S., 167.

"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which the various political and *municipal organizations shall possess*, and the settled decision of the highest court on this subject will be regarded as authority by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the State."

Clairborne v. Brooks, 111 U. S., 410.

The decision of the State Court in this case can not be reviewed, unless it clearly appears that a right claimed under the Constitution, section 10, article 1, has been impaired by the adjudication complained of.

Cooley's Con. Lim. (6th Ed.), 20, 21, 22, and note of page 210.

Fall Brook Irrig. Dist. v. Bradley, 164 U. S., 112.

The ruling of the State's highest appellate court, that a statute is consistent with a provision of its Constitution (and upon the same principle that it is inconsistent with its organic law) is conclusive upon the Federal tribunals.

Merchants, etc., Bank v. Pennsylvania, 167 U. S., 112.

THE CONTENTION OF PLAINTIFFS IN ERROR.

The plaintiffs in error insist that this case is brought within the exception to the general rule, that governed the court in Folsom v. Township, 96, 159 U. S., 611, and Shelby County v. Union Bank, 161 U. S., 149, 151, which follow the rule laid down in Burgess v. Seligman, 107 U. S., 20, and which was as follows: "So where contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts, after such rights have accrued. *But even in such cases, for the sake of harmony and to avoid confusion the Fed-*

eral Court will lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt.

If the construction placed upon article 5, sections 6 and 7 of the Constitution, that an act, authorizing the levy of a county tax for any other purpose than the ordinary or necessary expenses of the county, was unconstitutional if not specific became "a rule of property," when the decision was made in Barksdale v. Commissioners, supra, in 1885, the taxpayers of Wilkes County (represented here both by their agent and one of their number) have a right to invoke that rule as a protection against a tax attempted to be imposed upon them in October 1, 1889, even under the rule as stated in Shelby County v. Union Bank, 161 U. S., at page 151.

If upon a review of all the facts in this case, the question whether a Constitutional right of the plaintiffs in error has been invaded, or the question whether the right of the defendants, as taxpayers, to invoke a rule of property would be impaired by the assumption of jurisdiction by the Federal courts, is "balanced with doubt," the Federal courts have no power to interfere under the ruling relied upon by the plaintiffs in error.

Burgess v. Seligmon, supra.

A review of all the cases, that have recently arisen, involving the validity of municipal bonds, shows that these general laws have not been recited in any of the bonds brought in question, except in the single instance of the Stanly County bonds, and this course has doubtless been adopted because of the fact that the astute lawyers, who have prescribed the forms of the bonds, had no confidence in their efficacy, as a delegation of power to a particular county. See

Bank v. Commissioners, 119 N. C., 214.
Commissioners v. Snuggs, 121 N. C., 394.
City of Charlotte v. Shepperd, 120 N. C., 411, 122 N. C.
Rodman v. Washington, 122 N. C., 39.
Board of Commissioners v. Call, 31 S. E. R., 481.
Commissioners v. Payne, 31 S. E. R.

JUDGE SIMONTON OVERLOOKS BARKSDALE V. COMMISSIONERS, 93 N. C., 472, IN HIS OPINION, 89 FED. REP., 257, 265.

It is a significant fact that Judge Simonton, in an elaborate opinion construing sections 1996 to 2000 of The Code, overlooks the adjudication made before the bonds were issued in Barksdale's case, supra. In view of the rendition of that decision in 1885, the rule laid down by Judge Simonton (on p. 261 of 89 Fed. Rep.), does not apply in construing the sections of The Code, for the reason that *the bonds were not issued*, and of course the holders did not "become owners of municipal bonds before the decision of the State court invalidating them."

But if what has been said is not sufficient to show that sections 1996 to 2000 are insufficient as authority within the meaning of article 5, section 6, of the Constitution, the Court, in Commissioners v. Snuggs, 121 N. C., at page 403, said: "This reasoning leads us to the still further conclusion, that at the time when the Act of 1868 was brought forward, in The Code, sections 1996 and the four succeeding sections, it could have had reference to no cases, except those where the counties had a pecuniary interest in the unfinished roads, *at the adoption of the Constitution of 1868*, and that, therefore, The Code sections could not apply to the present case because the Yadkin Railway Company had not begun to construct the Wilkesboro branch of its road, and had not located said branch until long after the ratification of the Constitution of 1868." The words "direct pecuniary interest" has been construed by the Court in Galloway v. Railroad, 63 N. C., at pages 155, 156 and 158. The Court, in Commissioners v. Snuggs, supra, construed section 1996 of The Code to refer only to a direct pecuniary interest in a road unfinished in 1868, when the act was first passed. Authorities from many courts can be cited to show that the word "interest," in such a connection as used in that section, implies ex vi termini, a pecuniary interest, which it must be conceded the county of Wilkes did not have in 1887 to 1889.

Taylor v. Norment, 88 Ill., 527.
McGrath v. People, 100 Ill., 464.

Lenter v. Almeda County, 45 Cal., 7.
State v. Eastern R. C., 36 N. J. L., 184.
Shelton v. Derby, 27 Conn., 415–425.

The contract was made in contemplation of the decision in Galloway v. Railroad, supra, which the Court in Commissioners v. Snuggs, supra, had construed similar language in the Constitution, and that the Act of 1868 was intended to restrict counties, as the State was restricted to roads unfinished on April 24, 1868, when it is not pretended that work had been begun on the line. But the Court say that interest means pecuniary interest, and in that respect its construction is in accord with the current of authority elsewhere.

Supposing, then, that the Commissioners have relied solely upon this view, would the Supreme Court treat the State Court with so little consideration, as to say, that the question is not even balanced with doubt? True we do not think it is necessary to pass upon that construction, because the statute, as held in Commissioners v. Payne, 31 S. Rep., following Barksdale v. Commissioners, fails to meet the demands of section 6, article 5, of the Constitution.

FIRST ASSIGNMENT OF ERROR

is as follows:

"1. That the Court erred in holding that the original charter of the Northwestern North Carolina Railroad Company and the amendments thereto, enacted in the year 1868, did not authorize the Board of Commissioners of Wilkes County to submit the question whether said county should subscribe to the capital stock of said company, or to subscribe $100,000, with the approval of the qualified voters of said county, to the capital stock of said company. And said J. M. Turner and J. M. Welburn, plaintiffs in error, say, that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section, by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board."

The original charter, (chap. 17 of the Constitution and Ordi-

nances of 1868) was passed by the Constitutional Convention on the 9th of March, 1868.

Where a subscription had been authorized by any legislation before 1868, when there was no Constitutional requirement as to the manner of passing such acts, or, as to the sanction of the voters of a municipality, the authority became nugatory as to any inchoate contract of subscription by such corporations on the 24th of April, 1868.

Norton v. Brownsville, 129 U. S., pages 479–493.
Aspinwall v. Commissioners, 22 Howard, 364.
Wadsworth v. Supervisors, 102 U. S., 534–553.
Railroad v. Falconer, 103 U. S., 821.
Falconer v. Railroad, 69 N. Y., 491 (cited in Norton v. Brownville, supra, p. 490)..
Town of Louisville v. Portsmouth V. C. Bank, 104 U. S., pages 469–479.

"These cases (said Chief Justice Fuller in Norton v. Brownville, supra, referring to Concord v. Portsmouth Savings Bank, 92 U. S., 625; Falconer v. Railroad, supra; Railroad v. Falconer, supra; Wadsworth v. Supervisors, 102 U. S., 534–537; and Aspinwall v. Commissioners, 22 Howard, 364), sufficiently illustrate the distinction between the operation of a *Constitutional limitation upon the power of the Legislature, and a Constitutional inhibition upon the municipality itself. In the former case past legislation is not necessarily affected, while in the latter it is annulled.*" This was said in construing a provision in the Constitution of the State of Tennessee, substantially the same as section 7, article 7, of the Constitution of North Carolina, ratified April 24, 1868. If the inhibition contained in article 7, section 7, in section 14, article 2, and in article 5, sections 6 and 7, were self-executing and operated directly upon the counties, then it is clear, that on the 24th of April, 1868, the charter granted by the Constitutional Convention on the 9th of March, 1868, was nugatory, as authority to a Board of Commissioners to create a bonded debt in the face of the first two inhibitions as well as for the reason that the subscription involved the levying of a tax not "for county purposes" (held

to mean the "ordinary expenses" of the county), but for "a special purpose," which required a new act granting "the special approval of the General Assembly."

The material provision of the original charter (Ordinances of the Constitutional Convention of 1868, chap. 17, p. 57), are as follows:

"Sec. 2. That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties in shares of $100."

"Sec. 12. Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or material, for constructing said road, as the Board of Directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of the said company."

The act referred to in the ordinance is chapter 136 of the Laws of North Carolina of 1852. The particular section is 34, on page 499 of said act, and is in the following words:

"Sec. 34. Be it further enacted, That the corporate authorities of such towns, or the Justices of the Peace of such county, a majority of the justices of the county concurring to make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for the Members of the House of Commons of the General Assembly, whether the officers of said town and the Justices of the Peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter to be held for such county, and it shall be the duty of the sheriff to notify each justice of said county to attend at the courthouse to which he may make his returns of said poll."

The Constitution of North Carolina, containing the clauses limiting the power of municipalties to create debts, above set forth in full and for the first time incorporated in the organic law, was ratified by the people of the State at an election held on the 21st, 22d and 23d of April, 1868. The charter of the Northwestern North Carolina Railroad Company had been enacted by the Constitutional Convention long before the Constitution was finally passed upon as a whole, in March, 1868.

The foregoing authorities have established the principle that a subscription made under an enabling provision in a charter granted before such restrictive clauses as those adopted by the State of North Carolina in 1868 were embodied in the Constitution of the State, is not valid without new legislation, unless the contract was completed before the ratification and adoption of the Constitution. The bonds in this case having been issued since the 24th of April, 1868, and under agreement entered into by Wilkes County since that date, it is clear that the charter standing alone does not authorize the creation of the debt. Was the debt authorized by the amendment of the 11th of August, 1868? This act is contained in the Private Laws of North Carolina of the Special Session of 1868, and is as follows:

"Sec. 1. The General Assembly of North Carolina do enact: That an ordinance entitled 'An ordinance to incorporate the Northwestern North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is hereby re-enacted, ratified and confirmed, and all *acts and things heretofore done* under the provisions of the said ordinance *are hereby ratified and* confirmed."

"Sec. 2. That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance, incorporating the Northwestern North Carolina Railroad Company, or the Justices of the Peace of Forsyth County, or on the County Court of said county, be, and the same are hereby conferred on the Commissioners of said county."

"Sec. 3. The Commissioners of the county of Forsyth are hereby invested with full powers and authority to levy from time to time such tax as may be sufficient to pay the subscrip-

tion made by said county to the capital stock of the Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock. Ratified the 11th day of August, 1868."

THE AMENDMENT PASSED AT THE SPECIAL SESSION OF 1868 AND RELIED ON BY JUSTICE FURCHES IN HIS DISSENTING OPINION TO SUSTAIN THE VALIDITY OF THE BONDS, WAS NOT ENACTED BY THE GENERAL ASSEMBLY IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 14, ARTICLE 2, OF THE CONSTITUTION.

Justice Furches, in his dissenting opinion, calls attention to the fact that the counsel representing the plaintiff in error here, who were defendants in the State courts, and the counsel for the defendant here, who were plaintiffs in the State Court, signed an agreement setting forth a list of the statutes to be examined and considered by the Court in passing upon the question whether the county of Wilkes was clothed with the power to create the bonded debt. The learned Justice concludes that he is warranted in considering said act as before the court, because Clarence Call, Sheriff and ex-officio Treasurer of Wilkes County, who was a party-defendant in the original action in the Superior Court of Wilkes County, and did not appeal from the order enjoining and restraining him from paying the special tax fund collected by him for the purpose, in discharge of the accruing coupons on said bonded debt, was not a party to said agreement omitting the said private act from the list of acts to be so considered. It has been made proper, if not necessary, that the counsel who did sign said agreement should submit a paper explanatory of the omission to be considered as a part of the record in the Supreme Court of the United States, which paper is as follows:

"Supreme Court of the United States—October Term, 1898.

"J. M. Turner and J. M. Welburn, Plaintiffs in Error,

"against

"The Board of Commissioners of Wilkes County and C. C. Wright, Defendants.

"In error to the Supreme Court of North Carolina.

"The undersigned, Richard N. Hackett and A. C. Avery, representing as counsel respectively the plaintiff in error and the defendants above named, have observed that Justice Furches, in his dissenting opinion, calls attention to the fact that they omitted specifically to mention the Act of August, 1868, as one of the statutes purporting to authorize the Commissioners of Wilkes County to create the bonded debt which gives rise to the controversy and deem it due to themselves to submit a statement by way of explanation.

"Out of abundance of caution counsel had filed certified copies of extracts from the legislative Journals and certificates of the Secretary of State as custodian of the Journals, showing the failure to pass certain other amendments to the charter of the Northwestern North Carolina Railroad Company in the manner prescribed by section 14, article 2, of the Constitution; but those records and certificates had cost the county from twenty-five to fifty dollars each. It has not been directly decided in North Carolina, that the printed Journals of the legislative Houses would be competent evidence, though it had been so held in construing similar provisions of the Constitution and laws of Illinois.

"It appeared from an inspection of the Journals of the Senate of North Carolina of the session of 1868, that on the 24th day of July, 1868, (see p. 97 printed Journals of Senate of 1868), Senate Bill 45, 'A Bill Ratifying and Confirming the Charter of the Northwestern North Carolina Railroad Company,' was considered in Committee of the Whole and reported by the committee recommending its reference to the Committee on Internal Improvements; that on the 25th day of July, 1868, Mr. Forkner, for said committee, reported said bill back to the

Senate and recommended its passage (see printed Senate Journal, p. 101), and that no further action was taken on said bill until July 27 (see pp. 101 to 108, both inclusive, of said printed Journal of the Senate), when the following entry appears: 'The report of the Committee on Internal Improvements, to whom was referred S. 45, A bill ratifying and confirming the charter of the Northwestern North Carolina Railroad Company was taken up and concurred in by the Senate.

"'The bill passed its third and final reading by the following votes: * * * ' The language above quoted from the Journals is followed by a statement of the names of 33 Senators voting yeas and that there were no nays. The undersigned were unable to find any evidence in the Journals that the said bill had been passed by the Senate on its second reading and on a call of the yeas and nays, on a day different from that on which it passed its third reading in said body.

"The undersigned find (see p. 109 of the printed Journal of the House at the same session) that on the 28th day of July the said bill was transmitted to the House of Representatives, and that on August 11 the following account is recorded of its passage on the third reading, to-wit:

"'The Senate Bill to ratify the charter of the Northwestern North Carolina Railroad Company passed its third reading.'

"The undersigned find also that on the 11th day of August, 1868, said bill was enrolled and was signed by the Speaker and was transmitted to the Senate, and that therefore the act referred to by Justice Furches was not passed in the manner prescribed by the Constitution.

"The undersigned therefore submit as an explanation of the omission to which Justice Furches calls attention, that they did not deem it necessary to subject the county of Wilkes to the expense of offering the certified record of legislative proceedings, for the reason, that the question whether an act not passed in conformity to the said requirement of the Constitution was valid had already been raised under the Act of 1879 recited as authority for issuing the bonds, and if the Court should hold the Act of 1879 invalid, the Act of August, 1868, passed after the ratification of the Constitution of 1868 would

also be held invalid; but if the Court should hold that the Act of 1879 was valid as authority for issuing the bonds, it would be unnecessary to look for further authority in the Act of 1868.

"Respectfully submitted,

"RICHARD N. HACKETT,
For Plaintiffs in Error.
"A. C. AVERY,
For Defendants."

In the same way, counsel, as was done in order to save cost to the county of Buncombe in Commissioners v. Payne, decided at the same term, might have agreed that sub-section 4, section 8, chapter 20, of Battle's Revisal, purporting to give general authority to Boards of Commissioners of counties to submit such questions to a popular vote, was not enacted with the formalities prescribed in the Constitution. But this was not deemed necessary because the general Act of 1868–'69 passed at a subsequent session of the General Assembly, was reenacted as a part of The Code and was relied on as authority for issuing the bonds.

THE REENACTMENT OF ANY AUTHORITY PURPORTING TO BE CONFERRED BY THE ORIGINAL CHARTER WITHOUT COMPLIANCE WITH THE REQUIREMENTS OF THE CONSTITUTION, WAS NULL AND VOID.

It is not material in the consideration of the question now before us that the Act of August 11, 1868, was assumed by the courts in Hill v. Commissioners, 67 N. C., 367, and in Belo v. Commissioners of Forsyth, 76 N. C., 479, to be a valid act, because it appears that in those cases no evidence was offered to show that said act had not been properly passed, and in the absence of any testimony on the subject, the presumption of course arose that it had been regularly and properly enacted.

The same question arose in Amoskeag National Bank v. Ottawa, supra, where the Court said:

"Nor is it of any importance that the Acts of 1857 had been

assumed to be an existing law in Dunovan v. Green, 57 Ill., 53, and Force v. Battavia, 51 Ill., 99; for in each of those cases the validity of the statutes is not controverted, and by the established practice of that court no evidence of the contents of the Journals could be considered on appeal which had not been produced and made part of the case in the court below."

It would be a strange result of Call's refusal to appeal from the decision of the nisi prius judge, if he could claim the benefit of a private statute, which under the rules of evidence in North Carolina, is not considered by the courts unless offered in evidence and which the parties before the higher court agree is not in evidence, and thus conclude other parties before the court, though he is already estopped from denying that the bonds are invalid.

IF PROPERLY ENACTED, THE ACT OF AUGUST 11, 1868, DID NOT CONFER AUTHORITY ON THE COMMISSIONERS OF WILKES COUNTY TO CREATE A BONDED DEBT AND LEVY A SPECIAL TAX TO PAY IT.

1. Because section 3 of the act declares that the "Commissioners of the county of Forsyth are hereby invested with full powers and authority to levy from time to time such tax as may be sufficient to pay the subscription," and there is no rule of construction that would extend the power given only to a particular county by name, by any sort of implication for any other county. The rigid rule requiring a strict construction of statutes delegating authority to counties and other governmental agencies is clearly stated and well sustained by authority in the opinion of Justice Douglas, filed in the Supreme Court of North Carolina in this case.

2. Supposing for the sake of the argument that the original charter granted by the Convention of 1868 had been reenacted in accordance with the requirements of section 14, article 2, of the Constitution, the bondholders would still have been confronted by an insurmountable barrier to any recovery upon their bonds, in that the authority purporting to be conferred by the charter, (even if we incorporate into it the sections of chapter 136, Laws of 1852, referred to in it), is not sufficiently

specific to meet the demands of article 5, sections 1, 6 and 7 of the Constitution. The charter provides "*That all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules*, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina Railroad Company, for the government of such towns and counties as are now allowed to subscribe to capital stock of said company."

There being no special authority given to any particular county to submit the question of subscription to the people or to levy a special tax to pay the indebtedness, the act, if properly passed, fell within the condemnation of the Act of 1885, which was declared invalid in Barksdale v. Commissioners, 93 N. C., supra, because neither "special" nor "local."

The ratification of the charter by the Act of 1868 not being valid, the whole argument of Justice Furches in his dissenting opinion, and that of the Court in Belo v. Commissioners, and Hill v. the Commissioners, where it was treated as a valid act, falls to the ground in its application to the questions raised in the case at bar.

It may be that an act passed after the ratification of the Constitution, on the 24th of April, 1868, might operate to ratify and confirm a *contract of subscription made before the adoption of the Constitution.* Justice Furches says, in his dissenting opinion, 31 S. E. Rep., at page 488, "But this charter was passed and this submission was made and bonds issued *before the adoption of the Constitution of 1868, which did not go into effect until the 24th of April of that year.*" It is needless to speculate about questions that are not raised.

The Act of August 11 does not purport upon its face to ratify any contract except that theretofore made by the county of Forsyth. The language is, "and all acts and things heretofore done under the provisions of the said ordinance are hereby ratified and confirmed." Clearly heretofore meant before August 11, 1868, when the act was passed. The Forsyth County contract having been made, not in contemplation of, but prior to the adoption of the Constitution of 1868, may have been subject to ratification, but it is settled law in North Carolina that a

void contract can not be made valid and operative by an act of the Legislature, for the reasons, (1) that such an act would be judicial legislation; (2) that it would impair the obligation of any contract that would be effected by imparting validity to the void statute.

Stanmire v. Taylor, 48 N. C., 207.
Stanmire v. Powell, 13 Ired., 312.
Lowe v. Harris, 112 N. C., 485 et seq.

In Stanmire v. Taylor, supra, the Court said: "If the Act of 1852 (declaring plaintiff's grant valid) was intended to give life to the void grant under which the plaintiff claimed the premises, by giving a construction to it, the act was a judicial one, which it was not in the power of the Legislature to pronounce. If it be considered purely a legislative grant to the lessor of the plaintiff, then it violates the contract which it made with the defendant Taylor."

If the attempted agreement to pay the bonds was void, its invalidity grew out of the disregard of the Constitutional inhibition in force, when they were issued. To attempt to remedy that infirmity by a curative act would be a palpable effort to evade the prohibitory provision of the Constitution as well as an invasion of the rights of a co-ordinate branch of the Government, by attempting to decide upon the obligations of the taxpayers of the county to pay, and of its creditors to enforce by mandamus the payment of a large bonded debt, palpably void without legislation. Would it not be as clearly void after it was resorted to?

THE SUPREME COURT OF NORTH CAROLINA HOLD THAT NO CONTRACT WAS ENTERED INTO WHICH BINDS THE STATE.

Discussing the question, whether any contract was entered into under the original charter which under the Constitution of the United States, could not be impaired by subsequent State legislation or judicial decisions of the State Court, Justice Douglas, in the opinion filed in the Supreme Court of North Carolina, and which constitutes a part of the record, says:

"Thirdly. That ordinance did not create contract a between

the railroad company and the county of Wilkes. The only contract that has ever existed between them was the contract of 1868, which was subject to all of the Constitutional provisions then existing. The mere authority given in the charter of a railroad company to receive subscriptions from municipal corporations, where no consideration is given and no attempted exercise of the power, has none of the essential elements of a contract and is held at the pleasure of the law-making power. Much more is it subject to Constituional restrictions.

Town of Concord v. Bank, 92 U. S., 625–630.
Concord v. Robinson, 121 U. S., 165–169.
Loan Associaion v. Perry Co., 156 U. S., 692–697."

FOURTH ASSIGNMENT OF ERROR

is as follows:

"4. That the Court erred in holding that the holders of any or all of the $100,000 in bonds, executed by the Board of Commissioners of Wilkes County, and exchanged for the capital stock of the Northwestern North Carolina Railroad Company, the validity of which is the subject of controversy in this action, were estopped by the recital in the face of the bonds issued as to the legislation relied upon to authorize the issue of said bonds. And the said J. M. Turner and J. M. Welburn, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board."

Repeated adjudications of the Supreme Court of the United States have established the rule, that every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of such enactment and is also chargeable with notice of all infirmities appearing upon the face of such statute, or growing out of mandatory requirements of the organic law of the State, prescribing the mode of enacting them.

McClure v. Oxford, 94 U. S., 429.
Ogden v. Daves, 102 U. S., 634.
Anthony v. Jasper Co., 101 U. S., 693.
McGarahan v. Mining Co., 96 U. S., 316.
Post v. Supervisors, supra.

It is clear, that where parties contract in contemplation of an existing provision of the organic law or an existing statute affecting the validity of the contract, they are charged with notice of such provisions of law just as though they had been incorporated in the contract.

While ordinarily a municipality, after reciting in bonds issued by it, that a statute requiring elections to be held in a certain way and containing other directory provisions had been complied with, is held to be precluded from showing a want of compliance with such provisions of the statute in avoidance of its contract, it is not estopped from showing that a statute recited as authority for issuing such bonds was in fact no law. Holders of the bonds in controversy here can not avail themselves of the claim that they are innocent purchasers, when it appears that the Journals of the Legislature, preserved as evidence of its proceedings would, have shown, if examined by them, that the statute recited was null and void.

German Savings Bank v. Franklin Co., 128 U. S., 526.

But it is needless to discuss this assignment at length if, as is contended for the defendants, none of the other assignments can be sustained, and as a consequence no sufficient authority has been shown for creating the bonded debt.

CONCLUSION.

The defendants contend, upon the admitted facts:

1. That the Commissioners of Wilkes County were not authorized to create the debt either by the Act of 1879 or 1881, because it is admitted that either of said acts were passed as prescribed in the Constitution.

2. That they had no power under the authority conferred by the original charter, standing alone, because it was essential

to the exercise of such power under the Constitution that a new enabling act should have been passed after its ratification.

3. That the Act of August 11, 1868, was no law, because it failed to pass with the prescribed formalities, and therefore did not supply the defects in the original charter by authorizing a subscription after the ratification of the restrictive provisions in the Constitution of 1868.

4. That the Act of August 11, 1868, if it had been enacted in the required manner, would not have conferred authority upon the county of Wilkes to create a debt or levy a special tax for failure to comply with the mandates of article 5, section 6, of the Constitution, and because the ratification applied only to the subscription of Forsyth County, theretofore made.

5. That The Code, sections 1996 to 2000, were no more specific than was the Act of 1885, which was declared in Barksdale v. Commissioners, in the year 1885, and long before the bonds in controversy were issued, to be void because its provisions purporting to confer authority upon counties to levy a school tax were neither local nor special. The defendants contend that the agreement to issue bonds was entered into in contemplation of the decision in Barksdale v. Commissioners.

6. That the agreement to issue bonds was made in contemplation of the definition of an unfinished road given in article 5, section 4, of the Constitution, and in the construction of said article, embodying the language similar to that used in section 1996 of The Code, in Gallaway v. Railroad, 63 N. C., at pages 155, 156 and 158, article 5, section 4, of the Constitution which is as follows:

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuni-

ary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

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